Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	
Connect America Fund	WC Docket No. 10-90
A National Broadband Plan for Our Future	GN Docket No. 09-51
Establishing Just and Reasonable Rates for Local Exchange Carriers	WC Docket No. 07-135
High-Cost Universal Service Support	WC Docket No. 05-337
Developing an Unified Intercarrier Compensation Regime	CC Docket No. 01-92
Federal-State Joint Board on Universal Service	CC Docket No. 96-45
Lifeline and Link-Up	WC Docket No. 03-109

COMMENTS OF RCN TELECOM SERVICES, LLC

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RCN Telecom Services, LLC ("RCN") respectfully submits these Comments in response to the Commission's request for comment in its Report and Order and Further Notice of Proposed Rulemaking, released on November 18, 2012 (FCC 11-161) ("*Report and Order*" and "*FNPRM*," respectively). While the Commission requested comment on a wide variety of issues of critical concern to the industry, RCN's comments focus on the manner in which tandem transit rates should be regulated in the context of the broader transition established by the Commission's *Report and Order*. *See FNPRM* at ¶¶ 1311-13.

In the *Report and Order*, the Commission established a glide path to reduce reciprocal compensation rates—comprised of end office switching, tandem switching, and transport rate elements—to bill and keep by July 1, 2017 for price cap carriers and CLECs that benchmark their access rates to price cap carriers.[1] *See, e.g.*, *Report and Order*, at ¶ 801. If the transition established by the *Report and Order* proceeds as planned by the Commission, the rates for tandem transit services, which are similarly comprised of tandem switching and transport rate elements, should track the same transition path to bill and keep by July 1, 2017. To provide a different transition path for these incumbent local exchange carrier ("ILEC") services would be discriminatory, permitting ILECs to continue to recover cost-based or higher rates for the same services for which recovery has been eliminated for competitive carriers, which by and large do not provide transit services. Moreover, the Commission should recognize, as the state commissions and courts have done, that ILECs have an obligation to provide transit service at cost-based rates pursuant to Section 251(c)(2).

As a threshold matter, RCN does not support the transition below cost-based rates to bill and keep established by the Commission in the *Report and Order*. RCN provides these comments without waiving its concerns about the legality of the *Report and Order*, but with a recognition that those issues will be sorted out in the Tenth Circuit in the coming year.[2] In response to the Commission's request for further comment in the *FNPRM*, RCN submits that, should the transition below cost-based rates proceed, the transition must be implemented in a

[1] Like many competitive carriers, RCN competes primarily with price cap carriers. Accordingly, RCN will focus largely on the transition of transit rates for price cap carriers to bill and keep by July 1, 2017. RCN would not be opposed to a similar transition of tandem transit rates for rate of return carriers to bill and keep by July 1, 2020.

[2] The bill and keep provisions of the *Report and Order* have been appealed as inconsistent with, *inter alia*, the Communications Act and the FCC's prior rules and orders. *In Re: FCC 11-161*, Case No. 11-9900 (10th Cir. 2011).

nondiscriminatory manner that recognizes that tandem switching and transport functions should not be compensated differently simply because they are being performed by ILECs rather than CLECs.

I. TANDEM TRANSIT RATES SHOULD FOLLOW THE RECIPROCAL COMPENSATION TRANSITION TO BILL AND KEEP BY JULY 1, 2017 IF THE TRANSITION TO BILL AND KEEP IS DEEMED LEGAL

The FCC has recognized the critical importance of transit functions to the development of local competition, emphasizing the critical role they play in facilitating indirect interconnection:

> [I]ndirect interconnection via a transit service provider is an efficient way to interconnect when carriers do not exchange significant amounts of traffic. Competitive LECs and CMRS carriers claim that indirect interconnection via the incumbent LEC is an efficient form of interconnection where traffic levels do not justify establishing costly direct connections. As AT&T explains, "transiting lowers barriers to entry because two carriers avoid having to incur the costs of constructing the dedicated facilities necessary to link their networks directly." This conclusion appears to be supported by the widespread use of transiting arrangements.

Developing a Unified Intercarrier Compensation Regime, Further Notice of Proposed Rulemaking, 20 FCC Rcd. 4685, 4740, at ¶ 126 (2005) (citations omitted).

Incumbent local exchange carriers, as the owners of the tandem switches that dominate the transiting market, must be closely regulated to ensure that the rates they charge for the transit function do not unduly exploit their preferred position as the hub of the vast majority of section 251(b)(5) minutes exchanged between carriers. To permit ILECs to exploit their dominant position would not only permit them to reap an unearned and undue windfall from their historical monopoly advantage, but could also impede entry into the marketplace by new entrants that require indirect interconnection.

The network functionality utilized in performing the tandem transit function overlaps

with the functionality that comprises reciprocal compensation rates. Tandem transit is a combination of tandem switching and transport, while reciprocal compensation is billed at the tandem interconnection rate: tandem switching, transport, and end office switching. In short, the only difference between the two rates is end office switching. As the Commission has recognized, tandem switching and tandem transport are already part of the transition to bill and keep for price cap carriers where the terminating carrier is also the owner of the tandem switch: "the Order provides that bill-and-keep will be the pricing methodology for all traffic and includes the transition for transport and termination within the tandem serving area where the terminating carrier owns the serving tandem switch." *Report and Order* at ¶ 1312.

Because the network functionality involved in completing the tandem transit function is in large part identical to the functionality involved in reciprocal compensation, the Commission must apply the same transition to transit rates as it does to reciprocal compensation rates. If the Commission were to permit transit charges, predominantly collected by ILECs, to remain at current levels or increase to even higher levels, while eliminating reciprocal compensation charges, collected by ILECs and CLECs alike, it would clearly be discriminating in favor of the ILECs. By labeling the functions "transit" in one case, and "reciprocal compensation" in another, the ILECs would encourage the Commission to treat the same functions differently in a manner that clearly advantages ILECs at the expense of CLECs. Indeed, not only are tandem transit charges assessed predominantly by ILECs, they are also paid almost exclusively by CLECs.

This is not the first time that, through regulatory legerdemain, the ILECs have attempted to obtain higher rates for the same functions when they are selling them as opposed to when they are buying them. By encouraging the deregulation of the switching rates in the unbundled

network element platform ("UNE-P"), the ILECs significantly increased the "commercially negotiated" tandem and end office switching functions when sold to UNE-P providers, while continuing to pay lower rates for the exact same functions when paying reciprocal compensation to other CLECs. In fact, the ILECs also managed to create a third category of still lower switching rates for ISP-bound traffic, where again, ILECs were the net payors.[3] It is therefore critical for competitive parity as between ILECs and CLECs that the Commission ensure that tandem transit rates charged by ILECs follow the same downward glide path as the tandem interconnection rate reductions embodied in the *Report and Order*.

II. THE COMMISSION SHOULD CLARIFY THAT TRANSIT RATES ARE COST-BASED RATES SUBJECT TO SECTION 251(C)(2)

The Commission should take the opportunity of this *FNPRM* to mandate that tandem transit is subject to Section 251(c)(2). ILEC tandem transit rates are currently set at regulated rates, as they are generally widely incorporated into Section 251/252 interconnection agreements and billed out of state tariffs. Given the critical significance of cost-based transit services to indirect interconnection and competitive entry, the Commission should clarify once and for all that tandem transit is subject to Section 251(c)(2) cost-based rates.

In the *FNPRM*, the Commission recognizes that state commissions and the courts have already found that tandem transit services are subject to Section 251. *See FNPRM* at ¶ 1311. But the Commission also mistakenly states that "[t]ransit service is typically offered via commercially-negotiated interconnection agreements rather than tariffs." *Id.* at n.2366. The fact is that ILEC transit services are typically offered via either regulated interconnection agreements

[3] Arbitrage is defined as "the simultaneous purchase and sale of the same . . . commodities . . . in different markets to profit from unequal prices." The Random House College Dictionary, Revised Edition, at 69 (1980). If the Commission is determined to eliminate arbitrage (*see, e.g.*, *FNPRM*, at ¶ 1325), it must also be committed to eliminating the potential for ILEC arbitrage of tandem switching and tandem transport.

negotiated pursuant to Sections 251 and 252, or they are offered at regulated rates in ILEC tariffs on file with the state commissions. In RCN's experience, they are rarely offered through unregulated, commercially negotiated agreements.

The Commission is on sound legal ground in reaching a finding that ILEC tandem transit rates are subject to Section 251(c)(2). Every state commission that has addressed the issue has found that tandem transit rates are subject to Section 251(c)(2). *See In re Connect American Fund*, WC Docket 10-90 *et al.*, Comments of Cox Communications, Inc., at 14 & n.32 (filed Aug. 24, 2011). In addition, two federal courts that have addressed the issue have likewise found that tandem transit service is subject to section 251(c)(2). *Qwest v. Cox Nebraska Telecom*, 2008 WL 5273687, *3 (D. Neb. 2008); *Southern New England Telephone v. Pelermino*, 2011 WL 1750224, *8 (D. Conn. 2011). These courts have found that, when reading the Section 251(a) obligation to interconnect indirectly together with the Section 251(c) interconnection obligations, tandem transit falls squarely within Section 251(c): "When Section 251(a) is read in conjunction with Section 251(c), it is clear that Congress imposed this obligation in Section 251(c) of the Act." *Qwest*, 2008 WL at *3.

Significantly, the *Qwest* court also recognized the critical importance of transit service to the development of competition:

> The Court's finding is consistent with the purpose of the Act. Congress passed the Act to encourage competition among telephone service providers. Ensuring that carriers can obtain transit service at cost-based rates facilitates this goal. The FCC has recognized that "carriers that are indirectly interconnected may have no efficient means by which to route traffic between their respective networks" without the continued availability of transit service. Carriers that cannot indirectly interconnect with other carriers will be required to directly interconnect with every carrier they need to exchange traffic with. This alternative is neither economical nor efficient for some carriers, and as a result, may prevent carriers from entering the market.

Qwest, 2008 WL at *3 (citations omitted).

As such, the Commission should clarify that tandem transit rates are subject to Section 251(c)(2) and reject any and all ILEC efforts to increase ILEC transit rates above cost-based rates. To the extent that the courts ultimately find that the Commission's transition below cost-based rates to bill and keep is legal, the Commission should impose the same transition on tandem transit rates.

Finally, movement above cost-based rates would also fly in the face of the Commission's recent conclusions about the cost of switching functionality. Again, without waiving its right to respectfully disagree with the Commission, RCN would point to the Commission's findings in the *Report and Order* that the costs of switching (or "termination") are no longer what the Commission once said they were. *See Report and Order*, at ¶ 753 (finding that the costs of termination are "very nearly zero"). If the *Report and Order* withstands appeal, the cost of cost-based ILEC termination under Section 251(b)(5), which ostensibly approaches zero, cannot significantly differ from the cost of cost-based termination under Section 251(c)(2). The Commission should reject any suggestion that tandem transit rates be allowed to spike upwards because this would not only represent a significant departure from the Commission's current understanding of switching costs, but would provide a further undue regulatory windfall to the incumbents, and solely by virtue of their incumbency.

III. CONCLUSION

In order to enable competition to continue to develop, the Commission should ensure that transit rates continue to be regulated. The Commission should confirm the conclusion reached by several states and federal courts that transit rates are subject to Section 251(c)(2). Moreover, if the Commission is permitted to move cost-based rates below cost to bill and keep, the Commission should ensure that ILEC tandem transit rates are likewise transitioned to bill and keep on the same schedule as the tandem interconnection rate, moving to bill and keep by July 1, 2017 for price cap carriers.

Respectfully Submitted,

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